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# CERTIFICATE

## Supreme Court of the United States

**OCTOBER TERM, 1938**

## No. 598

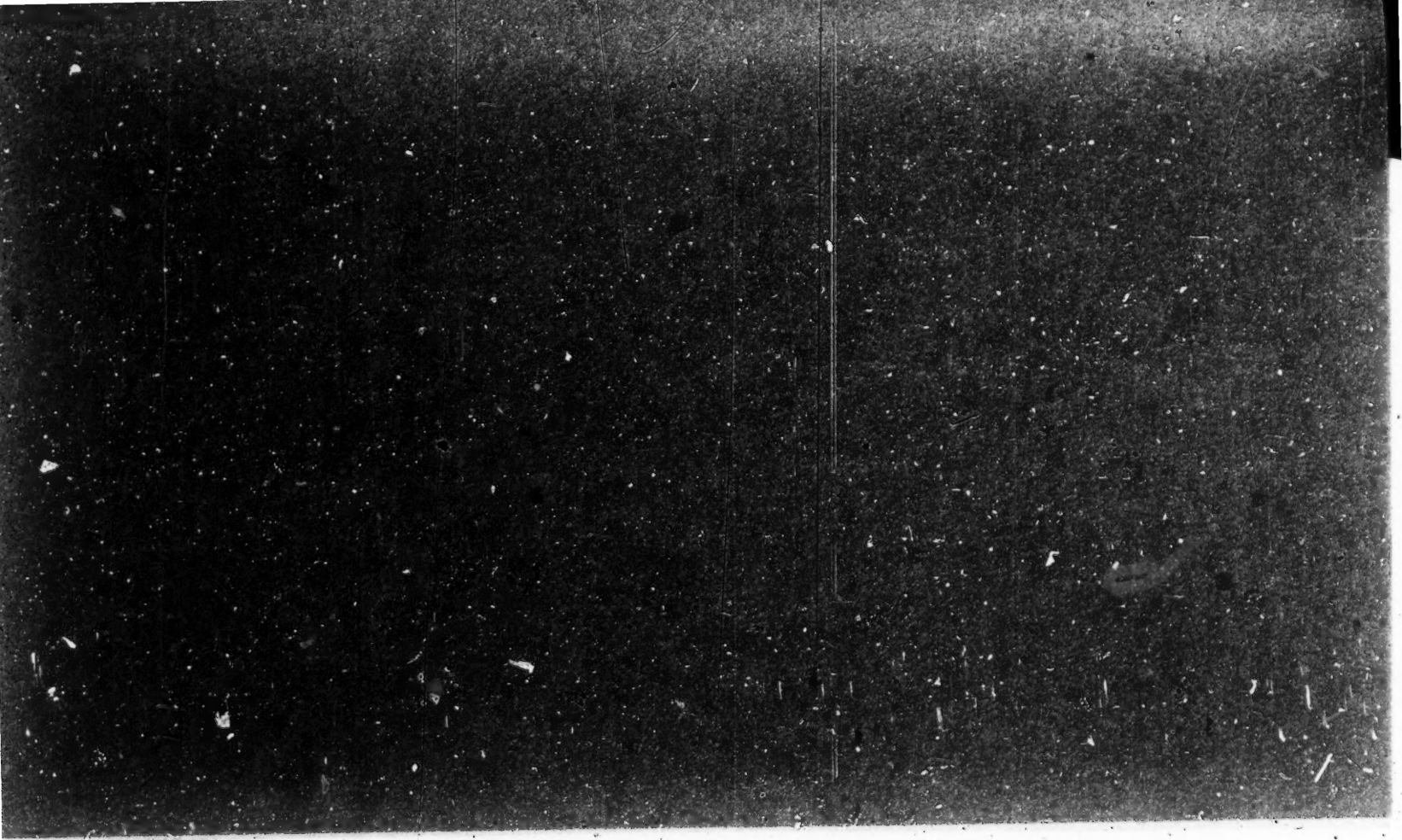
ATLAS LIFE INSURANCE COMPANY

*vs.*

W. I. SOUTHERN, INCORPORATED

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

**FILED JANUARY 16, 1939**



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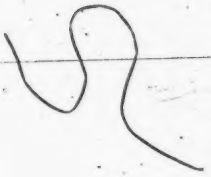
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INDEX.


| | Original | Print |
|---|---|---|
| Certificate from U. S. C. C. A., Tenth Circuit | 1 | 1 |
| Statement of case | 1 | 1 |
| Questions certified | 2 | 2 |
| Judges' signatures | 3 | 3 |
| Order of transmittal | 3 | 3 |
| Clerk's certificate (omitted in printing) | 4 | |


JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 18, 1939.



[fol. 1] [File endorsement omitted]

# IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH JUDICIAL CIRCUIT

No. 1733

ATLAS LIFE INSURANCE COMPANY, a Corporation, Appellant,

v.

W. I. SOUTHERN, INCORPORATED, a Corporation, Appellee

Appeal from the District Court of the United States for the Northern District of Oklahoma

CERTIFICATE—Filed January 4, 1939

In the above entitled cause certain questions of law have arisen on the record upon which this court desires the instructions of the Supreme Court of the United States for the proper decision of such cause. Accordingly a certificate of such questions has been prepared and duly signed by the judges of the court sitting in said cause as follows:

"CERTIFICATE OF QUESTIONS OF LAW

"STATEMENT

"On March 13, 1936, Atlas Life Insurance Company, a corporation organized under the laws of Oklahoma, issued three policies of insurance on the life of Wheaton I. Southern, one for $25,000.00, one for $15,000.00, and one for $10,000.00. The beneficiary in each policy is W. I. Southern, Inc., a corporation organized under the laws of Delaware. The several policies were issued upon a single application, dated March 9, 1936. The insured died February 23, 1938. [fol. 2] Each policy contained the following incontestable clause:

'This policy will be incontestable after two years from date of issue except for the nonpayment of premium and except as to provisions and conditions relating to disability benefits and those granting additional insurance specfically aganist death by accident, if any.'

and the following provision:

'All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall void this policy unless it be contained in the written application and a copy of the application is endorsed upon or attached to this policy when issued.'

On March 7, 1938, W. I. Southern, Inc., commenced an action against the Insurance Company on said policies in the district court of Tulsa County, Oklahoma, and on the same day summons was issued therein and served on the Insurance Company. On March 8, 1938, the Insurance Company filed its bill in equity against W. I. Southern, Inc., in the United States District Court for the Northern District of Oklahoma for cancellation of said policies on the ground that Wheaton I. Southern, in the application therefor, falsely, intentionally, and fraudulently made certain false answers to questions material to the risk. W. I. Southern, Inc., interposed a motion to dismiss the bill in equity on the ground that the Insurance Company had an adequate remedy at law by setting up the alleged fraud as a defense to the action on the policies pending in the state court. The trial court sustained a motion to dismiss the bill. The Insurance Company elected not to plead further. A decree was entered dismissing the bill, from which the Insurance Company has appealed.

Under the Oklahoma practice the Insurance Company can set up the fraud as a defense to the action at law on the policies, or can interpose a cross-complaint in that action for cancellation of the policies. Farmers & Merchants National Bank v. Hoyt, 29 Okl. 772, 120 P. 264.

[fol. 3] "The action on the policies brought in the state court was not removable by the Insurance Company since it was a citizen and resident of the state of Oklahoma.

"Question Certified

"1. Is the remedy at law available in the state court by setting up the alleged fraud as a defense to the action on the policies, such an adequate remedy at law as will constitute a valid defense to the suit in equity for cancellation of the policies?

"2. In order to constitute a defense to a suit in equity to cancel a policy of life insurance on the ground of fraud, is

it essential that the remedy at law be available to the complainant in an action at law pending in the federal court?

"3. Is the principle that the adequate remedy at law which will preclude a federal court of equity from granting relief must be one available in the federal courts, applicable in the instant case where the relief sought is affirmative in form but defensive in character?

Orie L. Phillips, Sam G. Bratton, Robert L. Williams, Judges of the United States Circuit Court of Appeals sitting in said case.

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ORDER

It is now here ordered by this court that such certificate be filed and entered of record in this court and a true copy of this order and the original of such certificate be duly certified by the clerk of this court and by him duly transmitted [fol. 4] to the Supreme Court of the United States for its action thereon.

January 4, 1939.

Approved: Orie L. Phillips, Circuit Judge.

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Clerk's certificate to foregoing paper omitted in printing.

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Endorsed on cover: File No. 43,083. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 598. Atlas Life Insurance Company, vs. W. I. Southern, Incorporated. Certificate. Filed January 16, 1939. Term No. 598, O. T., 1938.